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In The Supreme Court of The United States

OCTOBER TERM, 1941

No.....

BEN MAY,

Petitioner,

Versus

THE MIDWEST REFINING COMPANY,
STANDARD OIL COMPANY, and
STANOLIND OIL AND GAS COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Ben May respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit in the case of Ben May, Plaintiff, Appellant, versus The Midwest Refining Company, Standard Oil Company (of Indiana), and Stanolind Oil and Gas Company, Number 3637 on the docket of said Court, entered on June 6, 1941 (R. 432) affirming the decree of the District Court of the United States for the District of Maine in said cause (R. 400).

SUMMARY STATEMENT OF MATTER INVOLVED

This is a derivative and representative suit filed on January 13, 1933, (R. 2-35) by Ben May as a minority stockholder of The Midwest Refining Company, a corporation, against Standard Oil Company (of Indiana), Stanolind Oil and Gas Company, its controlled subsidiary, and The Midwest Refining Company. The complaint as amended on April 7, 1937, (R. 256-288) seeks in prayers (b) and (c) to set aside a sale of all assets of The Midwest Refining Company to Standard Oil Company and Stanolind Oil and Gas Company, and an accounting for all revenues received from said properties of The Midwest Refining Company since the date of said sale, upon the allegations that Standard Oil Company, the dominant majority stockholder of The Midwest Refining Company, by virtue of its dominance and in breach of its duties and obligations as trustee for the minority, had forced said sale to itself and its controlled subsidiary, Stanolind Oil and Gas Company, at a price which was inadequate to the extent of at least millions of dollars (R. 266), without making any effort to sell said assets to any other purchaser (R. 274). In prayers (d) and (e), the amended bill seeks recovery in the right of The Midwest Refining Company of approximately ten million dollars alleged to be due from Standard Oil Company, and, in the alternative that said sale is not set aside, it seeks to recover for The Midwest Refining Company over five million dollars of the purchase price agreed to be paid by Standard Oil Company for the assets of The Midwest Refining Company (prayer f), and to estab-

lish a liability of Standard Oil Company to The Midwest Refining Company arising out of an alleged fraudulent transfer of stock immediately before said sale (prayer g).

On January 13, 1938, defendants filed a "special motion" (R. 290) with two objectives, first, to strike out and dismiss prayers (b) and (c); second, in the event said prayers are stricken, to obtain a dismissal of the suit upon payment to plaintiff or into Court of plaintiff's share of any amounts that could be recovered on behalf of The Midwest Refining Company under the remaining prayers together with costs and counsel fees. The motion alleges as the basis for striking said prayers (b) and (c) that plaintiff had not filed a written dissent from said sale, from which is drawn the legal conclusion "that by virtue of the provisions of* Section 64 of Chapter 56 of the Revised Statutes of the State of Maine * * the complainant is not entitled to the relief prayed for in said prayers numbered (b) and (c); that the defendants herein should not be put to the great expense involved in the taking of testimony, preparation and trial of the issues raised by said prayers (b) and (c)" and are, for said reasons, "entitled as a matter of law and equity to have said prayers (b) and (c) stricken from the complainant's said amended Bill of Complaint." (R. 292-3). In the event, and upon the condition, that said prayers (b) and (c) be stricken from the plaintiff's complaint, the defendants offered "to submit to the demands of the complainant as set forth in the remaining prayers of his bill" and "to pay to the complainant his full share of any amounts that could be recovered under the remaining prayers (d), (e), (f) and (g)" together with

costs and counsel fees to be fixed by the Court (R. 293), and moved the Court to "determine the amount of the plaintiff's share in any recovery of the full amounts set forth in the remaining prayers (d), (e) (f) and (g) of said bill and determine the amount of costs and counsel fees to which the complainant and his counsel are entitled, and that upon payment by these defendants to the complainant or into this Court of the amount so determined, the complainant's bill be dismissed." (R. 293).

As a predicate for the latter relief, defendants alleged in said motion that all stockholders not represented or voting at the meeting at which said sale was voted, as well as all stockholders who had voted for said sale, had accepted their liquidating dividends without protest, and that Standard Oil Company, pending this suit, had acquired all of the stock that had voted against said sale except the stock of plaintiff, and that of Norwin S. Bean, who had elected to recover the value of his stock under the Maine valuation statute. From these allegations defendants drew the legal conclusion that there was no other stockholder similarly situated to plaintiff, or who had any right to intervene or join in the suit, and, upon this assumption, they alleged, as the basis of their motion to dismiss the bill upon payment of plaintiff's share of the recovery to which The Midwest Refining Company was otherwise entitled, that plaintiff's share in any recovery under said prayers (d), (e), (f) and (g) will be a small fraction of the expense to which defendants will be put in taking testimony and preparing the cause for trial on the merits. (R. 293).

The motion was submitted by defendants on ex parte affidavits (R. 294-300) to the effect that the records of The Midwest Refining Company showed that plaintiff, while voting against the sale in question, had never filed a written protest against the same; that pending the suit, Standard Oil Company had acquired all of the stock voting against the sale except that of plaintiff, and that of Norwin S. Bean, who instituted proceedings for valuation of his stock under the Maine statute, and that all other stockholders, except the holder of one share, had accepted their liquidating dividends without protest.

There was no evidence by affidavit or otherwise in regard to the alleged necessity for defendants to take voluminous testimony at burdensome expense, the affidavits offered to support the motion being entirely silent on that subject. There was accordingly no evidence to support the alleged burdensome expense that would result to defendants from allowing plaintiff's suit to proceed according to established practice to a recovery in the primary right of The Midwest Refining Company.

The motion having been submitted by respondents on said ex parte affidavits (R. 294-300) the Court rendered an opinion that the motion should be granted (R. 300-308), but instead of then entering a decree granting the motion, withheld such decree, and later entered an order appointing a master to take testimony (R. 309):

"1. In relation to the amount which would represent the plaintiff's proportion, based on his

proportionate stock holding in Midwest Refining Company, of the amounts claimed by the plaintiff in prayers d, e, f and g of the bill, assuming the allegations of the bill on which said prayers d, e, f, and g are predicated to be true.

2. In relation to the amount allowable to the plaintiff for counsel fees and expenses arising out of this litigation; * *."

At the reference before the Special Master it was stipulated by the parties through their attorneys of record, that assuming the truth of the allegations of the amended bill in regard to prayers (d), (e), (f) and (g), the total recovery under said prayers would be under prayer (d) $10,243,225.53; prayer (e) $119,-224.62; prayer (f) $5,091,164.96; and prayer (g) 101,-066.47, or a total under the four prayers of $15,554,-681.58, and that plaintiff's proportion thereof based on his proportionate stock ownership in The Midwest Refining Company is $1,246.22 as of November 1, 1932 (R. 389-90).

Based on this stipulation and testimony in regard to counsel fees and expenses, the District Court entered its final decree (R. 400) granting the special motion by striking prayers (b) and (c), by ordering the payment into Court of $1,246.22, representing plaintiff's share of the recovery under prayers (d), (e), (f) and (g) with interest to the date of the decree; the payment into Court of $40,800.00 for plaintiff's counsel fees; $2,346.27 for plaintiff's expenses; plaintiff's cost of court as taxed by the clerk; and by ordering that upon the payment of said sums with interest to date that "the plaintiff's bill be dismissed."

The payments were made (R. 401) and plaintiff's bill was dismissed as decreed in the final decree dated June 11, 1940, but filed June 12, 1940.

The United States Circuit Court of Appeals for the First Circuit affirmed the decree of the District Court for the District of Maine, granting said special motion and dismissing petitioner's complaint, on June 6, 1941 (R. 432), thereby sanctioning and approving a radical departure from the accepted and usual course of judicial proceedings in minority stockholder suits.

JURISDICTIONAL STATEMENT

This is a civil equity case in the United States Circuit Court of Appeals for the First Circuit in which petitioner, Ben May, prays a writ of certiorari to review the judgment of said Circuit Court of Appeals rendered in the above entitled cause on June 6, 1941, (R. 432), under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a suit by a minority stockholder in a dominated corporation, brought against the dominant stockholder on behalf of and in the right of said dominated corporation, can properly be disposed of by granting a special motion to strike from the complaint prayers seeking to set aside a sale of all corporate assets to said dominant majority stockholder and its controlled subsidiary, when such prayers are predicated

on allegations of the bill of complaint which state an equitable cause of action, and by then dismissing the bill of complaint, which seeks the recovery of millions of dollars alleged to be due by the dominant stockholder to the dominated corporation upon the offer of said dominant stockholder to pay plaintiff, and the payment into Court for the plaintiff of, his pro rata share of the recovery to which his corporation is entitled with costs and counsel fees.

REASONS FOR GRANTING THE WRIT

The United States Circuit Court of Appeals for the First Circuit by its judgment affirming the decree of the lower court granting said special motion, has sanctioned a radicial departure from the accepted and usual course of judicial proceedings in causes of action brought by minority stockholders to enforce corporate rights and to redress corporate wrongs.

HARRY T. SMITH

WILLIAM G. CAFFEY

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Attorneys For Petitioner, Ben May.

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the District Court on the special motion (R. 300) is reported in 25 Fed. Supp., 560. The opinion in the Circuit Court of Appeals has not been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 6, 1941 (R. 432). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, (28 U. S. C. A., Section 240 (a); 43 Stat. 936).

STATEMENT

A concise statement of the proceedings, and of the questions involved has been made in the foregoing petition.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in affirming (R. 432) the final decree of the United States District Court for the District of Maine (R. 400, 401) granting the special motion filed by defendants on January 13, 1938 (R. 290, 293).

2. The Circuit Court of Appeals erred in affirming (R. 432) the final decree of the United States District Court for the District of Maine (R. 400, 401) in-so-far as the same struck and dismissed prayers (b) and (c) from the bill of complaint as last amended.

3. The Circuit Court of Appeals erred in affirming (R. 432) the final decree of the United States District Court for the District of Maine (R. 400, 401) in-so-far as it decreed that the amended bill of complaint be dismissed upon the payment into Court by the defendants of the amount the Court determined to be the plaintiff's share as a stockholder in the full amounts claimed to be due The Midwest Refining Company, a corporation, under prayers (d), (e), (f) and (g) of the amended bill of complaint on account of the matters and things set forth and alleged in said amended bill of complaint, with interest, and the payment into Court with interest of plaintiff's counsel fees, and expenses.

ARGUMENT

As disclosed by the foregoing petition, a suit by a minority stockholder against a dominant majority stockholder, brought in the right of the dominated corporation, to set aside a sale of all assets of the dominated corporation to the dominant stockholder and its controlled subsidiary and for an accounting, and seeking, in addition, the recovery of a large sum of money, alleged to be due by the dominant stockholder to the dominated corporation, has been terminated without a trial on the merits by striking on mo-

tion supported only by ex parte affidavits the prayers seeking to set aside the sale and for accounting and by decreeing that the dominant stockholder pay into court $1,246.22 as plaintiff's share, as a stockholder, in a recovery of $15,554,681.58 claimed, and for the purposes of the motion, admitted to be due by said dominant stockholder to the corporation under the remaining prayers, together with $40,800.00 as counsel fees and $2,346.27 as expenses, and that the suit be dismissed upon the payment of said sums into Court.

Aside from the arbitrary striking from the complaint of prayers (b) and (c), based upon allegations which admittedly stated a sufficient cause of action for the equitable relief therein prayed, the procedure sanctioned by the judgment of the Circuit Court of Appeals is a manifest departure from established legal principles and practice in minority stockholder suits.

In their brief in the Court of Appeals the attorneys for defendants "concede that the procedure adopted in this case is novel" and that they "have been unable to discover any recorded case in which a similar motion has been passed upon * *." The District Court characterizes the procedure as "somewhat unusual." (R. 308). The Circuit Court of Appeals frankly concedes that it is novel and quotes the special motion in the margin of its opinion "Because of its novelty." (R. 420). We respectfully submit that it is not only novel and unusual, but is a radical and dangerous departure from the established principles of law governing derivative suits by minority stockholders in the right of their corporations. It is radical because it converts a suit in the right of the corporation to re-

cover over fifteen million dollars due to it into a suit by the minority stockholder to recover in his own right a part thereof proportionate to his stock ownership. It is dangerous because it establishes a precedent by which a dominant majority stockholder, who has used his power of domination to the loss and detriment of the dominated corporation, can escape full responsibility to said corporation and to other stockholders by dealing only with each stockholder who takes action in behalf of the corporation. It permits such dominant stockholder to force the dismissal of every suit brought by a minority stockholder who has the temerity and the financial ability to seek redress in behalf of the corporation for wrongs perpetrated on it and for debts due it, upon payment to him of an amount equal to his proportion of the claimed recovery in behalf of the corporation, leaving the other stockholders, who are entitled to the benefit of a recovery in said suit, to incur the risk and expense of bringing another suit and the further risk of being held barred by laches if they do so. The procedure countenanced in this case makes it impossible for any small minority stockholder or stockholders to compel restitution to the corporation of the amount due to it, because it permits the dominant majority stockholder to end each such litigation by electing to pay only the share or shares of the plaintiff or plaintiffs in the claimed recovery.

It is too stringent a requirement that each minority stockholder, in order to obtain his share of what is due his corporation, must be willing and financially able to take on himself the heavy burden of such litigation.

Pacific Railroad of Missouri v. Missouri Pacific Railway Co., 111 U. S., 505; 28 L. Ed., 498, 504.

In protecting the dominant majority stockholder from the consequences of its own wrongs and resulting obligations the decree of the District Court and the judgment of the Court of Appeals disregards the important and established law that "The corporation is a person and its ownership is a conductor that makes it impossible to attribute an interest in its properties to its members."

Klein v. Board of Tax Supervisors, 282 U. S., 19; 51 S. Ct. 15, 16; 75 L. Ed., 140.

Donnell v. Herring-Hall Marvin Safe Company, 208 U. S., 267, 273; 52 L. Ed., 481, 487.

And in disregarding this essential characteristic of a corporation with the result that the dominant majority stockholder is shielded from the consequences of his own wrongs and resulting obligations, these Courts refuse to consider the fact that the corporation has, or may have, creditors entitled to look to the recovery for payment of debts due to them, and the further fact that the government is or may be entitled to income tax running into millions of dollars upon receipt, by the corporation, of the $15,554,681.58, conceded for the purposes of the special motion to be due to it. (R. 431,432).

To the argument that individual relief to the minority stockholder "might prejudice the rights of creditors" and hamper or defeat the right of the gov-

ernment to collect income taxes, the answer of the Court of Appeals was that it regarded this argument "as beside the point." In other words, according to the opinion and holding of this Court, it was of no consequence in deciding whether corporate entity should be disregarded that the claims of ordinary creditors of the corporation might be prejudiced or that the obligation to pay income tax to the government might be avoided.

To the contrary, the rights of creditors and the holders of claims against the corporation "are paramount and their claims should be first satisfied," and in order that their claims may be safe-guarded corporate entity should not be disregarded by permitting a minority stockholder to sue for and recover only his pro rata share of what is due the corporation.

Boatright v. Steinite Radio Corp., 46 Fed. (2d) 385, 388 (C. C. A. 10th Circ.)

Nor will corporate entity ever be disregarded when to do so will defeat or hamper the collection of taxes.

Burnet v. Com. Imp. Co., 287 U. S., 415; 53 S. Ct. 198; 77 L. Ed., 399.

Klein v. Board of Tax Sup'rs., 282 U. S., 19; 51 S. Ct., 15, 16; 75 L. Ed., 140.

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Old Colony Tr. Co. v. Comm. of Int. Rev., 69 Fed., (2d) 699, 701-2 (C. C. A. 1st Circ.)

The process of reasoning, by which the Court of Appeals arrives at its conclusion is that the minority stockholder in bringing suit acts in "a dual role," and seeks both to redress a wrong to the corporation and to himself as a stockholder therein. From the asserted right on the part of the minority stockholder "at his pleasure" to continue the prosecution of the suit or to compromise, abandon or discontinue it until some other stockholder intervenes, the Court of Appeals draws its conclusion that the trial Court, against the will of such stockholder, has the power "to decree a dismissal of the plaintiff's bill upon payment in full of all of his individual damages." (R. 431). Assuming the soundness of the premise, the conclusion is an obvious non-sequitur. The rule stated, and the authorities cited, give the minority stockholder the option of continuing the suit in the primary right of the corporation, if he sees fit to do so. It does not and should not give the wrong-doing dominant stockholder the option to convert a suit in the primary right of the corporation into a suit in the secondary right of the individual stockholder to the detriment of other stockholders who have not joined, but to whose benefit the recovery would enure, and to the detriment of creditors of the corporation for debts due to them, including the very large indebtedness that would or concededly may accrue to the government for income taxes on the amount recovered in consequence of the suit. To say that the majority stockholder has the right at his election to dispose of the suit in the right of the corporation upon the basis of declining to prosecute it further at his own expense and risk, is a very different thing from saying that he can be forced to

abandon the assertion of the primary right of the corporation, regardless of its effect on other stockholders and creditors.

A minority stockholder suing in the right of the corporation is a trustee, whose position in the suit is "the precise equivalent of the guardian ad litem."

Whitten v. Dabney, 171 Cal., 621; 154 Pac., 312, 316.

He does not bring such a suit because his rights have been violated, or because the cause of action is his, or because he is entitled to relief.

United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S., 261, 263.

Dana v. Morgan, 232 Fed., 85 (C. C. A. 2nd Circ.) 3 Pomeroy's Eq. Juris. (4th Ed.) Sec. 1095, p. 2524-5.

Such a suit "can only be maintained on the ground that the rights of the corporation are involved. * * * The relief asked is on behalf of the corporation, not the individual stockholder; and if it be granted, the complainant derives only an incidental benefit from it."

City of Davenport v. Dows, 85 U. S. (18 Wall). 626; 21 L. Ed., 938.

Dickerman v. Northern Trust Co., 176 U. S., 181, 188; 44 L. Ed., 429; 20 S. Ct., 311.

Delaware & Hudson Company v. Albany and Susquehanna Railroad Company, 213 U. S., 435, 447.

The measure of relief that can be granted in a stockholder's suit for the benefit of the corporation is such only as could be granted to the corporation if it were complainant.

Collins v. Penn.-Wyoming Copper Co., 203 Fed., 726, 729.

"The suit, when brought by stockholders, is still a suit to enforce a right of the corporation and to recover a sum of money due to the corporation; and the corporation is a necessary party, in order that it may be bound by the judgment."

Porter v. Sabin, 149 U. S., 473, 478; 37 L. Ed., 815, 818.

It is only when the corporation could maintain the suit in its own right that a minority stockholder can maintain a derivative suit.

Gallagher v. Pacific American Co., 97 Fed. (2nd) 193 (C. C. A. 9th Circ.)

The controversy is between the corporation and the party whose acts are complained of, and the corporation is the beneficial plaintiff though joined as a party defendant.

City of Davenport v. Dows, 85 U. S., (18 Wall.) 626; 21 L. Ed., 938.

Sias v. Johnson, 86 Fed. (2d) 766 (C. C. A. 6th Circ.)

Arnstein v. Bethlehem Steel Corp, 18 Fed. Supp., 916 (D. C. E. D. N. Y.)

The value of the corporate rights involved, not the value of plaintiff's stock, determines the amount involved for jurisdictional purposes.

Hutchinson Box Board and Paper Co., v. Van Horn, 299 Fed., 424 (C. C. A. 8th Circ.)

Johnson v. Ingersoll, 63 Fed. (2d) 86 (C. C. A. 7th Circ.)

Any money judgment or final relief runs in favor of the corporation, not in favor of the minority stockholder.

Dana v. Morgan, 232 Fed. 85 (C. C. A. 2nd Circ.)

Wilhelm v. Consolidated Oil Corp., 84 Fed. (2d) 739, 748 (C. C. A. 10th Circ.)

Arnstein v. Bethlehem Steel Corp., 18 Fed. Supp., 916 (D. C. E. D. N. Y.)

Graham v. Dubuque Sp. Mach. Works, 138 Ia., 456, 114, N. W., 619, 621.

Harding v. American Glucose Co., 182 Ill., 551; 55 N. E. 577, 603.

3 Pomeroy's Eq. Juris. (4th Ed.) Sec. 1095, p. 2524-5.

And it is reversible error to enter judgment in favor of the complaining stockholder in proportion to his stock ownership.

United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S., 261,263.

Wilhelm v. Consolidated Oil Corp., 84 Fed. (2d) 739, 748 (C. C. A. 10th Circ.)

Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill., 312; 67 N. E., 17.

In upholding the decree of the District Court disposing of plaintiff's suit as a minority stockholder of The Midwest Refining Company by dismissing his amended bill of complaint on payment into Court of a pro rata part of the claimed recovery on behalf of The Midwest Refining Company plus counsel fees and expenses, the Circuit Court of Appeals for the First Circuit disregarded the essential nature of the suit as a suit in the right of the corporation and, in effect, converted it into a suit by plaintiff in his individual right. This could only be done by disregarding the corporate entity of The Midwest Refining Company, for certainly it is the rule "most important in business and law," that a "corporation is a person and its ownership is a conductor that makes it impossible to attribute an interest in its property to its members."

The basis for disregarding corporate entity of The Midwest Refining Company which is asserted in the special motion is that the acceptance of liquidating dividends by all stockholders except those who had voted against the inequitable sale, the filing of valua-

tion proceedings by Norwin S. Bean, and the purchase pending suit of the stock of all other stockholders who had voted against such sale except that of plaintiff left only the plaintiff to benefit by the further prosecution of the suit, and that as his share was only a small part of the expense defendants would necessarily incur to defend the suit on its merits, it would be an unconscionable hardship for the court to continue the suit in the primary right of The Midwest Refining Company, when defendants were willing to pay plaintiff his pro rata share of any recovery to which said corporation was entitled with costs and counsel fees. As already pointed out in the foregoing petition, defendants offered no evidence whatsoever in regard to the expense to which they would be put in the further defense of the suit and the record affords no basis in fact for the contention that the defense of the suit on the merits would be unduly burdensome. No more is it made to appear that the plaintiff alone is entitled to the benefits of a recovery of the fifteen and a half million dollars recoverable in the right of the corporation, The Midwest Refining Company. In the event of recovery in the right of the corporation, all debts of the corporation including claims for income taxes would be payable therefrom, and such creditors have a prior claim to that of the plaintiff.

Boatright v. Steinite Radio Corp., 46 Fed. (2d) 385, 388 (C. C. A. 10th Circ.)

Furthermore, if it be assumed, without allegation or proof, that there were no such creditors and that receipt by The Midwest Refining Company of the fifteen and a half million dollars alleged to be due to it

would create no liability for income tax, it is still not true that the plaintiff alone is interested in and entitled to participate in the recovery of this fifteen and a half million dallars.

It appears from the motion itself (R. 290-293) that there are fourteen stockholders owning 122 shares not represented or voting at the meeting at which the offer of Standard Oil Company to purchase all assets of The Midwest Refining Company was accepted; and from the amended complaint (R. 262) that there are two stockholders, owning 17 shares who voted for the sale, beside the eight directors each with a nominal ownership of one share.

If Standard Oil Company owes The Midwest Refining Company over ten million dollars in interest and on account of the other wrongs alleged to have been perpetrated by it, these stockholders are certainly entitled to their share of it. A fortiori, if Standard Oil Company owes The Midwest Refining Company over five million dollars, on account of the agreed purchase price, these stockholders have done nothing to forfeit their share in it. They are still stockholders of The Midwest Refining Company and as such are entitled to share in any moneys due it. Regardless of whether or not the minority stockholders accepted their liquidating dividends, they still have a stockholder's interest in the assets of the corporation and, therefore, an indirect interest in any amounts still due to it.

Those stockholders who received their liquidating dividends by thus accepting part only of what was due them did not forfeit their share in the additional $15,-

554,681.58 stipulated for the purposes of the special motion to be due by Standard Oil Company to The Midwest Refining Company. They did not forfeit their rights by not accepting May's invitation to join in the suit. The suit was for the benefit of the corporation and incidentally for the benefit of all stockholders, regardless of whether they intervened therein, and it was accordingly not essential to their rights to share in the fruits of a recovery that they first intervene in said suit.

Southern Pacific Co. v. Bogert, 250 U. S., 483, 489-90; 63 L. Ed., 1099.

Klein v. Board of Tax Sup'rs., 282 U. S. 19; 51 S. Ct., 15, 16; 75 L. Ed., 140.

Donnell v. Herring-Hall Marvin Safe Co., 208 U. S., 267, 273; 52 L. Ed., 481, 487.

But if plaintiff were the only stockholder entitled to insist that Standard Oil Company pay its indebtedness to The Midwest Refining Company there would be no case for disregarding its corporate existence. It is only in exceptional cases that corporate entity will be disregarded where to do so will prevent a circumvention of public policy, or prevent a fraud, or when one corporation is in fact nothing but the agency of another.

Consumers Construction Co. v. Commr., of Int. Rev., 94 Fed. (2d) 731, 734 (C. C. A. 1st Circ.)

Gillis v. Jenkins Petroleum Process Co., 84 Fed. (2d) 74 (C. C. A. 9th Circ.)

Burnet v. Commonwealth Imp. Co., 287 U. S., 415; 53 S. Ct., 198; 77 L. Ed., 399.

Old Colony Trust Co. v. Comm. of Int. Rev., 69 Fed. (2d) 699, 702 (C. C. A. 1st Circ.)

Majestic Co. v. Orpheum Circuit Inc., 21 Fed. (2d) 720, 724 (C. C. A. 8th Circ.)

Ulmer et al. v. Lime Rock R. R. Co., 98 Me., 579; 57 Atl., 1001.

Corporate entity will never be disregarded to further, or to protect against a fraud or other wrong, or to shield a majority stockholder from paying in full what he owes the corporation.

In re Collins, 75 Fed. (2d) 62, 64 (C. C. A. 8th Circ.)
Boatright v. Steinite Radio Corp., 46 Fed. (2d) 385, 386 (C. C. A. 10th Circ.)

The amended complaint seeks relief in the right of The Midwest Refining Company from conduct of its dominant majority stockholder which constituted an actual, intentional fraud on The Midwest Refining Company. Corporate entity should not be disregarded to shield such a wrong doer from the consequences of his own wrong.

But if the complaint had sought relief from conduct of the dominant majority stockholder which entitled The Midwest Refining Company to "relief by the application of equitable principles" as held by the lower court (R. 305) and, by the Court of Appeals (R. 428) the Court should not have disregarded the

corporate entity of The Midwest Refining Company to permit Standard Oil Company to escape in large measure the consequences of such inequitable conduct.

Nor should corporate entity be disregarded so as to deny The Midwest Refining Company the right to recover over five million dollars of the purchase price which Standard Oil Company agreed to pay but did not pay The Midwest Refining Company for its assets, according to the allegations of the amended bill.

The effort of the corporation, acting through a minority stockholder, to collect a large indebtedness due to it by a majority stockholder presents no such unusual condition as would justify the disregard of corporate entity, unless it can properly be said that such exceptional condition is created by the fact that the majority stockholder owns all but a small percentage of the outstanding stock. Such basis for disregarding the corporate entity of The Midwest Refining Company is expressly disclaimed by the Circuit Court of Appeals (R. 428) and it is well settled that corporate entity will not be disregarded either at law or in equity simply because the stock is owned by one or by a few rather than by many stockholders.

Burnet v. Commonwealth Imp. Co., 287 U. S., 415; 53 S. Ct., 198; 77 L. Ed., 399.

Old Colony Trust Co. v. Comm. of Int. Rev., 69 Fed. (2d) 699, 702 (C. C. A. 1st Circ.)

Majestic Co. v. Orpheum Circuit, Inc., 21 Fed. (2d) 720, 724 (C. C. A. 8th Circ.) and cases cited.

Ulmer et al. v. Lime Rock R. R. Co., 98 Me., 579; 57 Atl., 1001.

Nor does the acquisition of a large majority of the stock confer on such majority stockholder any equity to disregard corporate entity and thereby escape, in whole or in part, his obligation to the corporation arising out of his breach of trust as dominant stockholder, or arising out of his contract with the corporation.

Moore v. Los Lugos Gold Mines Co., 172 Wash., 570; 21 Pac. (2d) 253.

Theis v. Spokane Falls Gas Light Co., 34 Wash., 23; 74 Pac., 1004.

In re Paine, 200 Mich., 58; 166 N. W., 1036.

In re Doe Run Lead Co., 283 Mo., 646; 223 S. W., 600.

Thomas H. Mason v. Pewabic Mining Co., 133 U. S., 50; 33 L. Ed., 524.

Cox v. Stokes, 156 N. Y., 491; 51 N. E., 316, 323.

To establish such a rule would place the small minority stockholder at the mercy of the dominant majority.

In re Doe Run Lead Co., 283 Mo., 646; 223 S. W., 600.

Theis v. Spokane Falls Gas Light Co., 34 Wash., 23; 74 Pac., 1004.

In re Paine, 200 Mich., 58; 166 N. W., 1036.

Kavanaugh v. Kavanaugh Knitting Co., Inc., 226 N. Y., 185; 123 N. E., 148, 152.

Ervin v. Oregon Ry. & Nav. Co., 20 Fed., 577; 27 Fed., 625 (C. C. S. D. N. Y.)

MacArthur et al. v. Port of Havana Docks Company, et al., 247 Fed., 984 (D. C. D. Maine, S.D.)

Allied Chemical & Dye Corp. v. Steel & Tube Co., of Amer., 14 Del. Ch 1; 120 Atl., 486, 491-2.

The special motion of defendants, based upon which the lower court dismissed the amended complaint, conceded the right of The Midwest Refining Company to recover from Standard Oil Company for the several wrongs alleged to have been perpetrated on it, and for unpaid purchase price, an amount aggregating $15,554,681.58, according to stipulation (R. 389-90). It was error to dismiss the amended bill on payment of $1246.22 into Court for plaintiff and the further payment of his counsel fees and expenses.

Both the District Court (R. 305) and the Circuit Court of Appeals (R. 427) denied the right to strike prayers (b) and (c) upon the theory asserted by defendants in their special motion, viz., that plaintiff by not filing a written dissent from the sale must be deemed to have assented to it, and so can have no relief in equity against such sale (R. 292), and in so doing were supported by abundant authority.

MacArthur et al. v. Port of Havana Docks Company, et al., 247 Fed., 984 (D. C. D. Maine, S. D.)

Mason v. Carrothers, 105 Me., 392; 74 Atl., 1030.

Eagleson v. Pacific Timber Co., 270 Fed., 1008, 1010 (D. C. Del.)

Allied Chemical and Dye Corp. v. Steel & Tube Co., of Amer., 14 Del. Ch. 1; 120 Atl., 486.

Kavanaugh v. Kavanaugh Knitting Co., Inc., 226 N. Y. 185, 123 N. E., 148.

Theis v. Spokane Falls Gas Light Co., 34 Wash. 23; 74 Pac., 1004.

In re Paine 200 Mich. 58; 166 N. W., 1036.

In re Doe Run Lead Co. 283 Mo., 646; 223 S. W., 606, 609.

Both Courts agreed (R. 305 and R. 427) that the amended bill stated a case for equitable relief under said prayers, but concurred in striking out and dismissing them upon the assumption that the court was justified in exercising its power "to withhold its equitable relief of rescission, even though a case for such relief is made out, when it appears that to grant such relief would impose a burden upon defendant wholly out of proportion to the benefit which that relief would confer upon the plaintiff." (R. 428). Both assumed that the allegations of the bill as amended no longer showed a sale by a dominant majority stockholder to himself upon an inadequate consideration.

As to the first assumption there was no evidence offered by defendants to support the allegations of hardship which are averred in the special motion, the

ex parte affidavits, which alone were offered in support of said motion, being entirely silent on the subject. The second assumption is contradicted by the allegations of the amended bill. While the amendment did withdraw the general allegation that the sale of "lands, leases and concessions" of producing and non-producing acreage (R. 15) and certain other property including patents, copyrights, franchises, contracts and good will (R. 16) was for greatly less than their true value, it retained the specific allegation that the consideration was inadequate at least to the extent of millions of dollars of interest which Standard Oil Company owed, but for which it did not agree to pay anything (R. 266, Par. XII). This allegation brings the case made by the amended bill squarely within the rule that where a sale is made by a dominant stockholder to himself "inadequacy of price is unfairness, and condemned without further inquiry in an attempt to determine whether due to corruption or honest, but mistaken, judgment unconsciously swayed by adverse interest. There is no safety otherwise."

Geddes v. Anaconda Copper Mining Company, 222 Fed., 129, 133; 254 U. S., 590, 600, 602.

As dominating stockholder Standard Oil Company was in the position of a trustee for The Midwest Refining Company and for the minority stockholders.

Pepper v. Litton, 308 U. S., 295, 306; 60 S. Ct., 238, 245.

Southern Pacific Co. v. Bogert, 250 U. S., 483; 63 L. Ed., 1099.

MacArthur et al. v. Port of Havana Docks Company, et al., 247 Fed., 984 (D. C. D. Maine, S. D.)

Hyams v. Calumet & Hecla Mining Co., 221 Fed., 529, 537 (C. C. A. 6th Circ.)

Alaska Juneau Gold Mining Co. v. Ebner Gold Mining Co., 239 Fed., 638, 643 (C. C. A. 9th Circ.)

Wheeler v. Abilene National Bank Bldg. Co., 159 Fed., 391, 393 (C. C. A. 8th Circ.)

Stebbins v. Michigan Wheelbarrow and Truck Co., 212 Fed., 19, 28 (C. C. A. 6th Circ.)

Sidell v. Missouri Pacific Ry. Co., 78 Fed., 724, (C. C. A. 2nd Circ.)

Blanstein v. Pan American Pet. & Tr. Co., 21 N. Y. S. (2d) 651, 712-3.

According to the allegations of the bill this dominant stockholder sold to itself and its controlled subsidiary all of the assets of The Midwest Refining Company, a going and prosperous corporation, for the purpose of acquiring its assets and business for itself free of the minority stockholders, without any effort whatsoever to find any other purchaser and by private sale at which no other purchaser was given the opporunity to bid. It could not thus use its power for its "personal advantage and to the detriment of the stockholders" no matter how meticulous it may have been "to satisfy technical requirements."

Pepper v. Litton, 308 U. S., 295, 311; 60 S. Ct., 238, 247.

And this is true though the sale were made strictly according to the terms of a statute authorizing a sale of all assets of the corporation on the vote of a majority of the stockholders or directors.

MacArthur et al. v. Port of Havana Docks Company, et al., 247 Fed., 984 (D. C. D. Maine, S. D.)

Theis v. Spokane Falls Gaslight Co., 34 Wash., 23; 74 Pac., 1004.

In re Paine, 200 Mich., 58; 166 N. W., 1036.

In re Doe Run Lead Co., 283 Mo., 646; 223 S. W., 600, 609.

Kavanaugh v. Kavanaugh Knitting Co., Inc., 226 N. Y., 185; 123 N. E., 148, 152.

Ervin v. Oregon Ry. and Nav. Co., 20 Fed., 577; 27 Fed., 625 (C. C. S. D. N. Y.)

Allied Chemical & Dye Corp. v. Steel & Tube Co. of Amer., 14 Del. Ch. 1; 120 Atl., 486, 491-2.

While the minority stockholders under such statutes take the risk of a sale to a third party in good faith, they should not be compelled to take the risk of loss from the cupidity of a fiduciary selling to himself, or the risk of being able to prove actual fraud or inadequacy of consideration at enormous expense to themselves.

Geddes v. Anaconda Copper Min. Co., 222 Fed., 129; 254 U. S., 590, 600-2.

Pearson v. The Railroad, 62 N. H., 537, 540.

Story's Eq. Juris., Sec. 322.

Nor should they be compelled to take the risk of loss from a sale where no effort whatsoever is made to find a purchaser other than the dominant stockholder, but all possible competition is stifled by a private sale to the dominant stockholder at a price fixed by it.

Sidell v. Missouri Pac. Ry. Co., 78 Fed., 724 (C. C. A. 2nd Circ.).

Hyams v. Calumet and Hecla Min. Co., 221 Fed. 529, 542 (C. C. A. 6th Circ.).

The power of such a fiduciary "is at all times subject to the equitable limitations that it may not be exercised for the aggrandisement, preference or advantage of the fiduciary to the exclusion or detriment of the cestuis. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation."

Pepper v. Litton, 308 U. S. 295, 311; 60 S. Ct., 238, 247.

Not only are the dealings of such dominant stockholders subject to "rigorous scrutiny" but "where any of their contracts or engagements with the corporation is challenged the burden is on the * * stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the view point of the corporation and those interested therein * *. The essence of the test is whether or not under the circumstances the transaction carries the earmarks of an

arm's length bargain. If it does not, equity will set it aside."

Pepper v. Litton, 308 U. S., 295, 306; 60 S. Ct., 238, 245.

Geddes v. Anaconda Copper Mining Company, 254 U. S., 590, 599; 41 S. Ct., 209, 212; 65 L. Ed. 425.

The complaint as amended according to the express holding of both the District Court and the Circuit Court of Appeals is "sufficient in allegation at least to support a charge of unfair treatment and to entitle the plaintiff to 'relief by the application of equitable principles'." (R. 305, 428).

Defendants in their special motion make no attempt to meet the burden of showing either good faith or the inherent fairness of the sale from the view point of the corporation and the minority stockholders and from the allegations of the amended complaint it definitely appears that the sale, absolutely dominated as it was by the majority stockholder Standard Oil Company, carried none of "the earmarks of an arm's length bargain."

As a consequence of the natural advantage held by a dominant majority stockholder numerous strategies have been successfully devised to prevent the prosecution of minority stockholders suits to a conclusion on the merits. For this reason, the remedy provided by such suits has never been entirely effective or adequate.

41 Columbia Law Review, 405, 421, 422.

The present decision goes beyond all others and practically takes away the remedy of small minority stockholders seeking to redress wrongs to their corporations by permitting the dominant stockholder, who has perpetrated such wrongs, at its election, to force a dismissal of the suit upon the payment of a pro rata part of what the corporation is entitled to recover with the result that the dominant stockholder being caught is forced "to disgorge part of his (its) profits" but "is still financially better off than if he (it) had remained honest."

41 Columbia Law Review, 405, 427.

Respectfully submitted,

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In The Supreme Court of The United States

OCTOBER TERM, 1941

No. 575

BEN MAY,

Petitioner,

Versus

THE MIDWEST REFINING COMPANY, STANDARD OIL COMPANY, and STANOLIND OIL AND GAS COMPANY.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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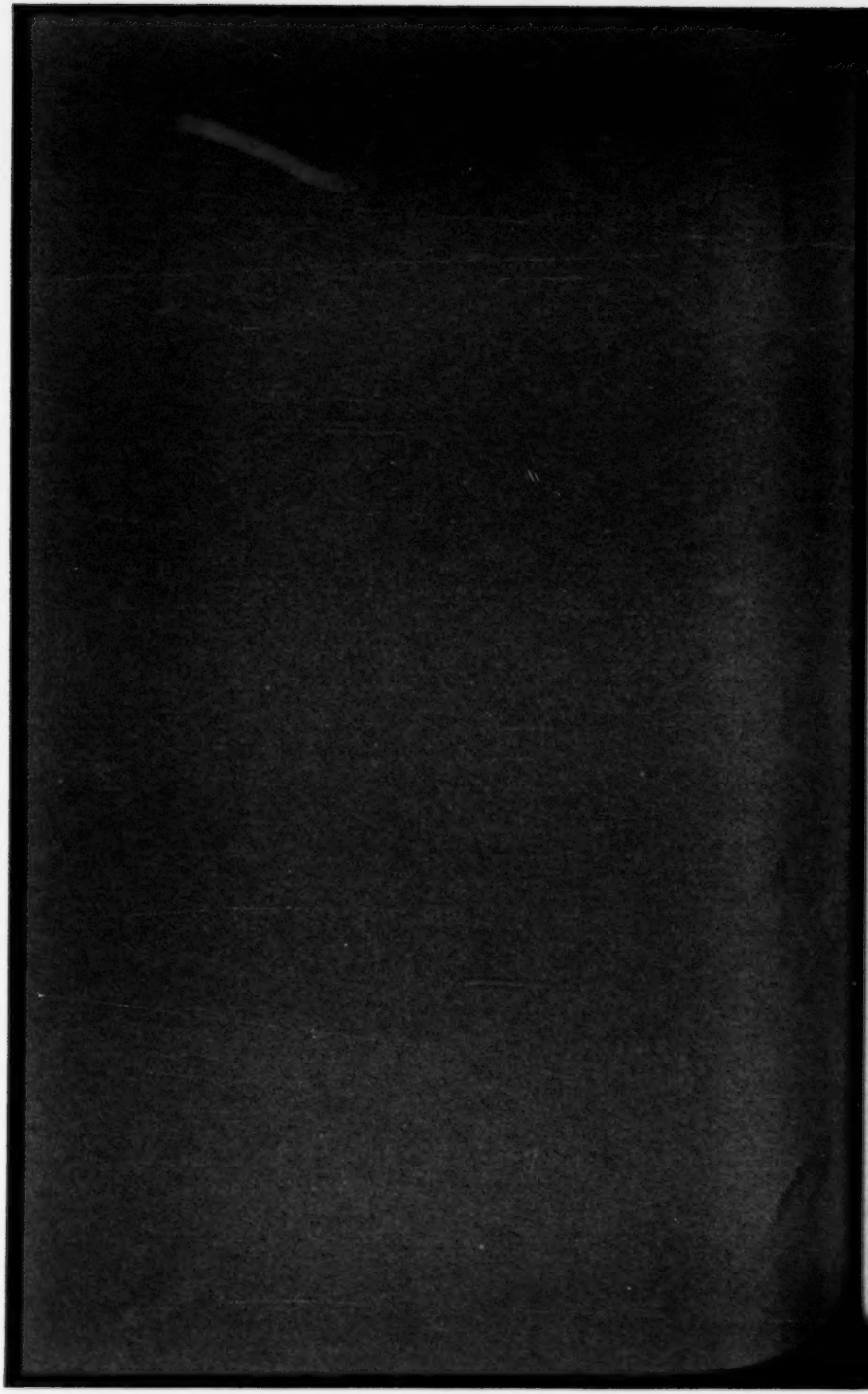

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In The Supreme Court of The United States

OCTOBER TERM, 1941

No. 578

BEN MAY,

Petitioner,

Versus

THE MIDWEST REFINING COMPANY,
STANDARD OIL COMPANY, and
STANOLIND OIL AND GAS COMPANY.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the District Court for the District of Maine is found in *May* vs. *Midwest Refining Co.*, et als, 25 Fed. Supp. 560. The opinion of the Circuit Court of Appeals for the First Circuit affirming the District Court's decision is found in *May* v. *Midwest Refining Co.*, et als, 121 Fed. (2d) 431.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 6, 1941 (R. 432). The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347(a); 43 Stat. 936).

STATEMENT OF FACTS

The respondents are willing to accept the "Summary Statement of Matter Involved" as set forth by the petitioner on pp. 2-6 incl. of the Petition with the following exceptions:

1. On p. 2 at line 13 of the Petition, the petitioner states that the bill alleges that the Standard Oil Company * * * * * * "forced said sale to itself and its controlled subsidiary, Stanolind Oil & Gas Company, *at a price which was inadequate to the extent of at least millions of dollars.*" (Italics supplied). This is misleading. There is no general allegation in the amended bill of complaint that the price was inadequate. Such allegation did appear in the original bill but was omitted in the amended bill. The allegation in the amended bill (Par. XII of amended bill: Rec. p. 266) sets forth that "the consideration * * * * was admittedly inadequate to the extent of millions of dollars *of interest* which was charged to or paid by the said Standard Oil Company in the latter part of November, 1932." This is a complaint that at the time of the sale on November 1, 1932, the agreed purchase price was inadequate to the extent of millions of dollars that were subsequently paid by Standard. It is a complaint about a wrong, if it were a wrong, which was righted before the bill of complaint was brought and is therefore not an issue in the case. It is thus apparent that the bill contains no general allegation of inadequate price and that the special allegation of inadequacy is of academic interest only, the amount by which it is alleged the consideration was inadequate having been paid weeks before this

action was commenced. The significance of this point will appear in the argument (Infra p. 10).

2. The respondents reject that portion of the first full paragraph on p. 4 of the Petition which begins "From these allegations" (line 11) and ends with "upon this assumption" (line 15) as argumentative and not germane to the statement of facts. Respondents concede that the special motion alleged that plaintiff's share in any recovery under prayers (d), (e), (f) and (g) would be a small fraction of the expense to which respondents would be put in taking testimony and preparing the cause for trial on the merits.

3. Respondents reject the second paragraph on p. 5 of the Petition as argumentative and beyond the proper scope of the statement of facts.

4. The respondents agree that the United States Circuit Court of Appeals for the First Circuit affirmed the decree of the District Court for the District of Maine granting said special motion and dismissing petitioner's complaint as appears in the second paragraph on p. 7 of the Petition but deny that in so doing the Circuit Court of Appeals was "thereby sanctioning and approving a radical departure from the accepted and usual course of judicial proceedings in minority stockholder suits."

ARGUMENT

At the outset respondents wish to correct the impression the petitioner seeks to create that this case establishes a precedent of far reaching importance. He would have this Court believe that the decision ignores all established practice in minority stockholder suits, disregards the corporate fiction and introduces a dangerous new doctrine into the law. This is emphatically not so. The case is so unique on its facts that it is unlikely that a similar situation will ever

occur again. A combination of circumstances has produced a situation in which the petitioner, an exceedingly small minority stockholder, is for all practical purposes the only stockholder interested. The corporation has been liquidated. All other stockholders have either sold their holdings to Standard Oil Company or have accepted years ago without protest their liquidating dividend. Under these circumstances the court below refused to order the rescission of the sale of $80,000,000 worth of assets of every description made more than six years before in the face of an offer to pay to petitioner all he could have lost on his own allegations, plus counsel fees and costs. In so doing the court blazed no new trail but merely applied the well recognized rule of equity that, as the Circuit Court of Appeals put it in its opinion (121 Fed. (2d) at p. 438), "since it is the function of a court of equity to do equity it may decline to grant relief of an equitable nature when such relief would produce an inequitable result." That is all there is to this case.

Viewed in this light the respondents believe that the question presented as set forth on p. 7 of the Petition should be revised to read as follows: Whether a court of equity may in its discretion refuse relief to a minority stockholder where the granting of such relief would produce an inequitable result.

The sole ground relied upon by the petitioner for the granting of the writ is the so-called "sixth reason" set forth in the rules, (U. S. Supreme Court Rule 38, Par. 5(b); namely, that the Court of Appeals in affirming the decision of the lower court "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this court's power of supervision."

By relying on this ground alone the petitioner has conceded that none of the other five grounds are applicable. We

submit that the sixth likewise does not apply to the case at bar.

As said in Hughes Federal Practice, Sec. 6306:

> "The sixth reason * * * * defines the categories in which certiorari is used in its ancient nature as an extraordinary writ. It concerns situations with which certiorari was anciently identified, providing for supervision akin to that exercised on mandamus and other extraordinary writs."

See also 14 C.J.S., Sec. 2, Certiorari, where, in discussing the nature of certiorari at common law, it is said:

> "Certiorari is an extraordinary writ offering a limited form of review, its principal function being to keep inferior tribunals within their jurisdiction."

Illustrations of this principle are *Wm. Cramp & Sons Ship & Engine Bldg. Co.* v. *International Curtis Marine Turbine Co.*, (1912) 228 U. S. 645, 33 S. Ct. 722; 57 L. Ed. 1003 (decree by Circuit Court of Appeals of which judge giving *pro forma* decree below was a member); *In re Chetwood* (1896), 165 U. S. 433, 17 S. Ct. 385, 41 L. Ed. 782 (certiorari granted to revise order of circuit judge enjoining prosecution of writ of error in Supreme Court); *Delaware L. & W. R. R. Co.* v. *Rellstab* (1928), 276 U. S. 1; 48 S. Ct. 203, 72 L. Ed. 439, (certiorari granted to correct setting aside of judgment after term had adjourned); *Farrell* v. *O'Brien* (1905), 199 U. S. 89, 25 S. Ct. 727; 50 L. Ed. 101, (certiorari granted to determine jurisdiction of Circuit Court to admit Washington will to probate).

It seems obvious therefore that this ground was not intended to cover an allegedly erroneous decision on the merits or, as in this case, the exercise by a court of equity of its discretion to refuse relief where it feels that the granting of the relief prayed for would be more inequitable under the circumstances than withholding it.

Regardless, however, of technical considerations, we submit that the petition should be denied.

The petitioner's argument briefly summarized is as follows: This is a minority stockholder's suit brought for the benefit of Midwest to redress alleged wrongs to that corporation as the result of a sale of all its corporate assets to its dominant stockholder. Under these circumstances the dominant stockholder stands in the position of a trustee and the sale can be set aside if in any respect unfair. The action is derivative for the benefit of the corporation and the corporate fiction can not be disregarded so as to permit the recovery by the minority stockholder of his pro rata share. The lower courts, by granting the defendants' special motion, have failed to observe these (allegedly) accepted principles and in so doing have sanctioned a "radical departure from the accepted and usual course of judicial proceedings" which calls for the remedial action of this Court.

The defendants' contention is (1) that the action of the lower courts does not constitute a "radical departure from the accepted and usual course of judicial proceedings" and (2) even if it did, the action was entirely proper under the unusual circumstances of the case.

1. The action of the lower court in sustaining defendants' special motion does not constitute a "radical departure from the accepted and usual course of judicial proceedings."

The defendants maintain that the action of the District Court in granting defendants' special motion was nothing more than the exercise of the well established discretion of an equity court to deny relief where it would be inequitable to grant it.

Farmer v. *City of St. Paul,* (1896), 65 Minn. 176; 67 N. W. 990; 33 L. R. A. 199.

Miller vs. *Des Moines,* (1909), 143 Iowa 409; 122 N. W. 226.

Brasher, et al v. *Miller,* (1896), 114 Ala. 485; 21 So. 467.

J. B. Brown & Sons v. *Boston and Maine Railroad* (1909) 106 Maine 248; 76 Atl. 692.

Pomeroy Equity Jurisprudence, 4th Ed., Sec. 2215.

The petitioner seeks to create the impression that the decision of the District Court is a judgment for the petitioner in his individual right, thus disregarding the established doctrine that a minority stockholder's suit is a suit for the benefit of the corporation, that recovery must be by the corporation, and that the corporate fiction cannot be disregarded so as to allow the individual stockholder to recover personally his pro rata share. This is manifestly not the case. The lower court rendered no judgment for the petitioner in the true sense of the word. It simply incorporated into its decree dismissing the bill the offer of the defendants to pay the petitioner his pro rata share of all that could possibly be recovered on his own allegations. Although the decree in fact orders the defendants to pay said sum into court, it could just as effectively have decreed that, upon payment of said sum into court, the bill would be dismissed. In view of this it must be apparent that the lower court did nothing more than to exercise its undoubted right to refuse to grant the relief prayed for in the complaint. Defendants' offer in its special motion was simply an added consideration for the court in determining that it would be inequitable to grant such relief under the circumstances.

The situation is not, as petitioner seeks to imply, that the respondents in their special motion admitted liability to Midwest for the amounts claimed in prayers (d), (e), (f) and (g) of the amended bill, totalling some fifteen million dollars, and sought to avoid payment of that large amount

by paying the petitioner his pro rata share. On the contrary the special motion denied such liability but in effect said "The expense of contesting this action on the merits is so burdensome and so out of proportion to the plaintiff's interest in any recovery that could be had if all his allegations were true that, while denying liability, the respondents, in order to rid themselves of such burden, prefer to pay and offer to pay to the plaintiff his full pro rata share in any possible recovery under the bill and to make him whole by paying also his reasonable counsel fees and costs as determined by the Court. As the circumstances of the case and the lapse of years with no intervention by other stockholders demonstrate that plaintiff is the only stockholder who is interested, he should not be permitted to insist upon the carrying through of this litigation in the face of such an offer." What the District Court did was in effect to say: There is sense in what the defendants have said. The plaintiff, under the peculiar circumstances of this case, is found to be the only person interested in promoting this litigation and it is inequitable to permit him to force upon the defendants the trouble and expense therein involved when he can receive now under their offer all that he could get if the litigation were carried through and terminated completely in his favor.

The defendants say therefore that the procedure below did not constitute a radical departure from the accepted and usual course of judicial proceedings. There is nothing unusual or unaccepted in a court of equity refusing to grant the relief prayed for where an inequity would result. There is nothing unusual or unaccepted in a motion as the means of bringing some matter before a court of equity. The fact, if it were a fact, that no precedent can be found for bringing this particular recognized equitable principle before a court by this precise form of motion certainly does not constitute a radical departure from the accepted and usual course of judicial proceedings.

It is the same old stone in a different setting. Moreover the procedure here adopted is not without precedent. An offer to submit to the plaintiff's demands is recognized in equity practice as analogous to an offer to be defaulted. In *Whitehouse on Equity Practice,* Vol. 2, Sec. 327, it is said

> "When a defendant submits to the whole demand of the plaintiff and to pay the costs, he has a right to apply to the court to dismiss the bill or stay all further proceedings."

This principle has been applied to creditors' bills in a number of cases in which it has been held that the defendant is entitled to have the bill dismissed over the objection of the plaintiff creditor (no other creditor having intervened as a party) upon payment of the plaintiff's claim and costs.

Innes v. *Lansing,* (1839), 7 Paige (N. Y.) 583.

Pemberton v. *Topham,* (1838), 1 Beav. 316.

Thompson v. *Fisher,* (1881), 33 N. J. Eq. 480.

See also *Sivell* v. *Abraham,* (1846), 8 Beav. 598.

2. The action of the district court was entirely proper under the unusual circumstances of this case.

Even if this court feels that the decree of the District Court might amount to a novel and unprecedented method of disposing of minority stockholders' suits of this nature, the defendants maintain that the District Court was entirely correct in its decision in view of the exceptional circumstances of this case. In discussing this point we realize that in effect we are arguing the merits of the case, which are not before this Court on a petition for certiorari, and we should refrain from doing so were it not for the fact that the greater part of the petitioner's argument is directed to that end, and we feel therefore compelled not to allow those portions of petitioner's brief to remain entirely unanswered.

We have said before that this case is unique and that it is doubtful whether a similar one will ever arise again. Consider the situation. At the time of the sale complained of, all but four one-hundredths of one per cent of the stock of Midwest, or 241 shares out of 624,074, was owned by the defendant, Standard Oil Company, or its nominees. At the time defendants' special motion was filed, all of these 241 shares, with the exception of the plaintiff's 50 shares and 12 shares owned by Norwin S. Bean, had either accepted the liquidating dividend or been acquired by Standard. Bean had elected to have his shares valued under the Maine valuation statute. As a practical matter therefore no one else was interested in the proceeding except the petitioner. This in itself is a fact which is exceedingly unlikely to be duplicated. In addition all the allegations of the petitioner's bill with respect to the amount to be recovered are either definite or ascertainable by computation (contrary to the petitioner's claim there is no general or effective allegation of inadequacy of consideration, see comments under "Statement of Facts", supra p. 2), and the only other relief sought would involve rescission of a sale of over $80,000,000 worth of assets of all kinds made six years previously, an obviously impossible, impractical and economically wasteful procedure.

Under these circumstances what conceivable purpose is served by forcing the unscrambling of this eighty million dollar egg or the carrying through of a long and costly litigation in the face of an offer to pay the petitioner all he possibly could recover on his own allegations, together with such counsel fees and costs as the court should fix and determine. We submit that defendants' special motion, however novel, is simply plain common sense and that the court in refusing to grant relief exercised its discretion in the only reasonable way possible.

If, therefore, the corporate fiction was disregarded, it was an ideal case in which to do so. The corporate fiction has

often been disregarded where the ends of justice were served thereby. *Wormser, Disregard of the Corporate Fiction,* pp. 9 and 78.

Petitioner's argument, (p. 20 of his brief), based on the effect of the dismissal of the bill on the rights of possible creditors and on the Government's possible right to additional income taxes is, as the Circuit Court stated in its opinion, "beside the point" and seems so clearly so that we can conceive of its having no other object than to befog the issue or to seek to prejudice the Court. If any reply to this argument is needed, it would seem sufficient to say that in the many years this litigation has been pending no creditor has evidenced any interest in the proceeding by seeking to intervene, that there is no evidence in the case that there was an unpaid creditor of Midwest and that, if any creditor of Midwest in fact existed, Standard Oil Company, generally believed to be thoroughly solvent, assumed the liabilities of Midwest in connection with the purchase, as appears in the amended bill (R. p. 268). As to income taxes, it would seem sufficient to say that there is nothing in the record to show what income taxes were in fact paid, what, if any, claims the Government may have made, or what, if any, adjustments have been made and finally that the Treasury Department is generally supposed to be able to look after the interests of the United States without the aid of minority stockholder suits.

Petitioner further asserts that the District Court, by granting defendants' motion, deprived the non-complaining owners of 151 shares of stock of their pro rata share in any recovery by the corporation. Petitioner's solicitude for these silent and apparently satisfied stockholders in spite of the fact that he receives his full share under defendants' motion may conceivably spring from the highest of altruistic motives, but the fact remains that not one of these stockholders has intervened or evinced any interest in the proceeding dur-

ing the nine years it has been in court. Moreover they are not prejudiced by the dismissal since a suit by one of a class in behalf of all relieves all from the imputation of laches.

Overfield v. *Pennroad Corporation* (1941) 39 Fed. Supp. 482;

Southern Pacific Co. v. *Bogert* (1918) 250 U. S. 483, 39 S. Ct. 533, 63 L. Ed. 1099.

Petitioner could at any time have dismissed the case without the consent of other stockholders, none having intervened as parties. From this as the Circuit Court said (R. p. 431) "follows the power of the court under the circumstances of this particular case, to decree a dismissal of the plaintiff's bill upon payment in full of all of his individual damages".

Finally the petitioner asserts that there is no evidence in the ex parte affidavits or elsewhere that the defendants would be put to burdensome expense in the defense of this litigation. This is the first time petitioner has advanced this argument as he did not raise it either in the District Court or the Circuit Court of Appeals. We submit however that the fact is self evident and a matter of judicial notice. Law suits involving over $15,000,000 and concerning transactions occurring far from the place of trial can be defended only at large expense. A reading of the amended bill of complaint alone will disclose the magnitude of the asserted claims and the trouble to which the defendants would be put to defend the case on the merits. Moreover a sufficient answer to this argument is that in effect it complains that the trial court erred in the determination of questions of fact or in other words that the decision was wrong on the merits which is clearly not open on a petition for certiorari.

CONCLUSION

In conclusion the respondents maintain that this Petition should be denied because the case does not fall within the

reasons for which certiorari will be granted, the dismissal of the petitioner's bill of complaint did not constitute a radical departure from the accepted and usual course of judicial proceedings and even if it did it was entirely proper under the peculiar circumstances of the case.

Respectfully submitted,

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